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Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

**No. 46**

MAURICE A. HUTCHESON, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

**PETITIONER'S REPLY BRIEF**

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**PETITIONER'S REPLY BRIEF**  
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The prosecution's brief appears to narrow the issues in this case to one, namely, an insistence that a Congressional committee, which is engaged in questioning a witness then under a State indictment as to matters admissible against him and harmful to him at the trial of that indictment, can force that witness to invoke the privilege against self-incrimination, in terms, under penalty of being jailed for contempt if, as here, he rests his refusal to answer on an asserted denial of due process of law.

Surely if, in the course of a criminal trial, the United States Attorney called the defendant to the stand in order to force him to refuse to answer, and the latter thereupon rested on a "denial of due process of law," expressly disclaiming any privilege against self-incrimination, a mistrial would be declared almost automatically. We submit that here, similarly, where the Committee commenced by reading an accusation against petitioner (R. 22-23), it cannot then force him, when he is called as a witness, to claim the privilege against self-incrimination, with the result that, when he objects on due process grounds, he must go to jail.

Normally, of course, doubts regarding the desirability or necessity of reply briefs should be resolved against filing. But since the prosecution's written arguments in this case improperly refer to matters outside the record; put forward numerous propositions that rest on significant omissions; base a strongly-pressed contention on admitted speculation; trivialize a fundamental constitutional right into a mere form of words; and then pointedly refuse to face up to the concept of Federalism in this field formulated by Chief Justice Marshall, we are constrained to believe that some clarifying words by way of answer will prove helpful rather than merely burdensome.

#### **I. THE PROSECUTION'S BRIEF IMPROPERLY REFERS TO MATTERS NOT IN THE RECORD.**

In three particulars, the prosecution's brief refers to and hence presumably relies upon matters outside the record of trial, in violation of the rule that "We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presented to the Circuit Court of Appeals." *McClellan v. Carland*, 217 U.S. 268, 283.

1. Only a few pages of Government Exhibit 6, the Committee's Second Interim Report (Sen. Rep. No. 621, Part 2, 86th Cong., 1st sess.) were admitted at the trial, namely, pp. 517-518, 518-519, 554-561, 590-592. See Pet. Br. 24 and note 4, where complete and detailed record references are set out.

At U.S. Br. 8, note 2, however, there are references to pages of that Report not in evidence, viz., pp. 533-550.

In view of the circumstance that the pages to be admitted were settled by stipulation at the trial (R. 169-173), there is manifestly no justification for violating that agreement now.

2. At U.S. Br. 11, note 4, there is a reference to some hearings before a Subcommittee of the Senate Committee on Public Works, the so-called Gore Committee, at which it is said that petitioner testified.

Since any events before the the Gore Committee were mentioned at the present Labor-Management Committee hearings only as "background information, not as testimony" (R. 21), with a later reiteration (R. 23), "That is not evidence, but it is information;" and since the proceedings of the Gore Committee were not introduced into evidence at the trial now under review, they plainly do not belong in any brief filed on appeal.

3. At U.S. Br. 20-21, note 8, there are citations to newspaper articles that referred to the AFL-CIO Code of Ethics, and then to that Code itself.

The Code was mentioned once at the hearings in general terms (R. 146-147), but neither the document itself nor anything relating thereto was either offered or received in evidence at the trial. No doubt the Assistant United States Attorney there, experienced as he was in the prosecution of contempt-of-Congress cases, did not consider such material either relevant or necessary. Even if he was wrong,

however, omissions in his presentation cannot properly be supplied now, at the second stage of appellate review.

Plainly, none of these references are within the realm of judicial notice, any more than petitioner could have been convicted below simply on judicial notice of his testimony before the Labor-Management Committee.

In *Lawn v. United States*, 355 U.S. 339, 354, this Court, less than four years ago, granted a motion to strike the references in a Government brief to matter not included in the record of that case, thus reaffirming in emphatic fashion a settled rule of appellate procedure. We will not trouble the Court with a similar motion here. But, now that the impropriety of this practice of attempting to pretty up a record after the grant of certiorari has been so recently emphasized, only to be once more repeated here, we respectfully urge that it be again discountenanced.

## **II. NUMEROUS PROSECUTION ARGUMENTS REST ON SIGNIFICANT OMISSIONS.**

**A.** The prosecution's contention that the Committee's inquiry furthered a valid legislative purpose omits to mention the Chairman's statement of purpose and moreover misreads the authorizing resolution.

1. When the Committee Chairman, called as a prosecution witness at petitioner's trial, was asked to state the Committee's objectives, he answered (R. 165),

"Our legislative purpose is to search out and find if crime has been committed."

Nowhere in the prosecution's arguments on the legitimacy of the Committee's legislative purposes (U.S. Br. 33-39, Point I) is the foregoing sworn testimony mentioned.

2. We have said (Pet. Br. 70-76, Point II) that, since the Committee's charter (R. 176, 179) directed it to ascertain whether "criminal . . . practices or activities are,

or have been, engaged in," it was exercising functions reserved exclusively to the Executive and the Judiciary, as it is no part of a Legislature's functions to ascertain whether crime, i.e., the violation of existing criminal laws, has been committed. Here, unlike the situations considered in *Barenblatt v. United States*, 360 U.S. 109, and in *Wilkinson v. United States*, 365 U.S. 399, the remarks of Committee members or of its Chairman are not relied on to add a purpose not set forth in the authorizing resolution. Here the Chairman's testimony is consistent with, and consistent only with, the Senate's direction to ascertain whether crimes had been committed. There is no question here of probing into motives, but only a matter of ascertaining, from a highly authoritative source,\* the expressed scope and purpose of the inquiry.

3. We do not question, we never have questioned, we could not question, the power of Congress to investigate in order to determine whether legislation is necessary. But no such purpose is served by the portion of the authorizing resolution that we are now calling into question, the direction to ascertain whether "criminal . . . practices or activities are, or have been, engaged in." Such an inquiry is, very plainly, limited to violations of existing law.

The distinction is one of substance. If merely "improper" practices are or have been engaged in, a purely subjective characterization in no sense limited, then Congress can legislate to make those improper practices criminal for the future. But suppose a Congressional committee finds that actual crimes have been committed, that an existing provision of criminal law has been violated; what legislation can it then enact? An act declaring the persons involved guilty? That would be a prohibited bill of attainder. Const., Art. I, Sec. 9, cl. 3. And, if the matter inquired about is one in respect of which no valid legisla-

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\* Cf. *United States v. Presser*, 292 F. 2d 171 (C.A. 6), pending on writ of certiorari, No. 278, this Term.

tion can be enacted, the inquiry is not one for a legitimate legislative purpose. *McGrain v. Daugherty*, 273 U.S. 135, 171; *Kilbourn v. Thompson*, 103 U.S. 168, 194.

4. Most of the resolutions involved in the cases cited at U.S. Br. 34—the Department of Justice Investigation resolution (*McGrain v. Daugherty*, 273 U.S. 135, 151-152), the Teapot Dome resolution (*Sinclair v. United States*, 279 U.S. 263, 287-288), the House Un-American Activities resolution (*Watkins v. United States*, 354 U.S. 178, 201-202)—did not even resemble the resolution here in question (R. 176-180). None of those just cited directed the legislative committee concerned to ascertain whether crimes—i.e., violations of existing law—had been committed.

Possibly it could be argued that parts of the resolution constituting the Kefauver Committee went that far.<sup>1</sup> But in the only case that sustained any portion of a conviction for contempt of the Kefauver Committee, the legality of that Committee's creation was not contested (*United States v. Costello*, 198 F. 2d 200, 202 (C.A. 2), certiorari denied, 344 U.S. 874), and in another, where the entire con-

<sup>1</sup> S. Res. 202, 81st Cong., 2d sess. The resolution actually adopted originated as an amendment in the nature of a substitute presented by Senator Kefauver (96 Cong. Rec. 6148-6149, 6245, 6246); it is quoted in *Marcello v. United States*, 196 F. 2d 437, 438-439 (C.A. 5). For the convenience of the Court we set forth its operative portions as they appear at 96 Cong. Rec. 6149:

"That a special committee . . . is authorized and directed to make a full and complete study and investigation of whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law of the United States or of the State in which the transactions occur, and, if so, the manner and extent to which, and the identity of the persons, firms, or corporations by which such utilization is being made, what facilities are being used, and whether or not organized crime utilizes such interstate facilities or otherwise operates in interstate commerce for the development of corrupting influences in violation of law of the United States or of the laws of any State: . . ."

viction was emphatically reversed (see quotation at Pet. Br. 48-49), the point we make under the present heading seems not to have been presented. *Aiuppa v. United States*, 201 F. 2d 287, 289 (C.A. 5). In any event, the practices followed by the Kefauver Committee, as reflected in the reversals visited upon virtually all the convictions of persons cited for contempts before it, are hardly a safe guide to constitutional limitations upon the scope and procedures of Congressional investigating committees. See *Poretto v. United States*, 196 F. 2d 392 (C.A. 5); *Marcello v. United States*, 196 F. 2d 437 (C.A. 5); *United States v. Costello*, *supra* (in part); *Aiuppa v. United States*, *supra*; *United States v. Doto*, 205 F. 2d 416 (C.A. 2).

What we are specifically concerned with here is a resolution directing a committee of Congress to parallel the activities of grand juries, United States Attorneys, and the F.B.I. in order to ascertain whether (R. 176, 179) "criminal . . . practices or activities are, or have been, engaged in."

We do not suggest for a moment that a congressional committee must bring its investigative activities to a grinding halt simply because, in the course of pursuing legitimate legislative inquiries, it incidentally discovers that crimes have been committed. *McGrain v. Daugherty*, 273 U.S. 135, 179-180. We simply say that, where an avowed purpose of a legislative inquiry, as here, is to find whether criminal activities have been carried on, such an investigation does not have legitimate legislative ends. Accordingly, anyone sought to be punished for obstructing the illegal Congressional purpose must go free, even though in other respects the committee's inquiry was perfectly proper. Cf. *United States v. Rumely*, 345 U.S. 41.

5. We have shown (Pet. Br. 70-73) that the Committee frankly and openly declared that its purpose was exposure, and (Pet. Br. 73-74) that its Second Interim Report demonstrated that it did not need petitioner's answers for any

fact-finding purpose. But, says the prosecution (U.S. Br. 39), this argument "overlooks the fact that the committee had sought to ascertain the nature of the connection of the Teamsters Union with the 'fix' about which it was inquiring, and that its efforts in this respect were largely frustrated by petitioner's and other witnesses' refusal to testify."

But the relevant portions of that Report, quoted at Pet. Br. 24-26, show precisely the contrary; the Committee made very specific findings as to the alleged connection of the Teamsters Union with the so-called "fix." Here again, the Committee found all the facts that it wanted to find without the testimony of the witnesses questioned as to that matter who refused to answer on grounds of self-incrimination, as well as without petitioner's testimony, whose refusal to answer was rested on a denial of due process. No one who reads objectively the excerpts from the Report already quoted (Pet. Br. 24-26) can fairly discover therein the slightest failure on the part of the Committee to pinpoint Teamster participation in the Lake County matter.

Moreover, since the prosecution also argues (U.S. Br. 52-53, 54) that the Committee would have been prepared to honor a claim of privilege by petitioner had he made one, it is plain in still another aspect that the Committee was not interested in fact-finding nearly as much as it was in insisting that petitioner claim the privilege against self-incrimination in terms, with all the penalties and disadvantages thereunto appertaining.

If, therefore, the Committee's efforts were in any sense "frustrated" (U.S. Br. 39), it was only because, since petitioner refused to invoke the privilege against self-incrimination, it could not by reason of such invocation assert, as it did in respect of other witnesses (see Pet. Br. 10-13, 82-83), that by claiming that privilege he had admitted his guilt.

The prosecution argues (U.S. Br. 38) that "A congressional committee must be its own judge of the amount of evidence needed to enable it to discharge its legislative responsibilities and report back to its parent body with findings and recommendations. It would be inappropriate for the judicial branch to undertake to review the exercise of so peculiarly discretionary a determination."

That argument is entirely irrelevant, for the reason that here the question concerns, not abstract legislative determinations, but a prosecution for contempt of Congress in the courts of the United States. If petitioner goes to jail it will be in consequence of judicial action. Therefore, since the issue is whether he has in fact been guilty of improperly refusing to answer, it is not only appropriate, it is necessary, cf. *Deutch v. United States*, 367 U.S. 456, 471-472, to ascertain whether Congress was engaged in proper fact-finding, a process which petitioner is alleged to have frustrated, or whether it was instead pursuing an improper and non-legislative purpose, interference with which could carry no sanctions. *McGrain v. Daugherty*, 273 U.S. 135, 171; *Kilbourn v. Thompson*, 103 U.S. 168, 194. The fact that the inquiry may enter on a delicate area is of course no reason for not making it in the course of reviewing a conviction for crime. *United States v. Rumely*, 345 U.S. 41. Just as, when "the construction to be given the [Senate] rules affects persons other than members of the Senate, the question presented is of necessity a judicial one," *United States v. Smith*, 286 U.S. 6, 33, so here, where an individual's liberty turns on the legitimacy or otherwise of a legislative purpose, the courts not only can but must make the necessary inquiry.

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That argument is entirely irrelevant, for the reason that here the question concerns, not abstract legislative determinations, but a prosecution for contempt of Congress in the courts of the United States. If petitioner goes to jail it will be in consequence of judicial action. Therefore, since the issue is whether he has in fact been guilty of improperly refusing to answer, it is not only appropriate, it is necessary, cf. *Deutch v. United States*, 367 U.S. 456, 471-472, to ascertain whether Congress was engaged in proper fact-finding, a process which petitioner is alleged to have frustrated, or whether it was instead pursuing an improper and non-legislative purpose, interference with which could carry no sanctions. *McGrain v. Daugherty*, 273 U.S. 135, 171; *Kilbourn v. Thompson*, 103 U.S. 168, 194. The fact that the inquiry may enter on a delicate area is of course no reason for not making it in the course of reviewing a conviction for crime. *United States v. Rumely*, 345 U.S. 41. Just as, when "the construction to be given the [Senate] rules affects persons other than members of the Senate, the question presented is of necessity a judicial one," *United States v. Smith*, 286 U.S. 6, 33, so here, where an individual's liberty turns on the legitimacy or otherwise of a legislative purpose, the courts not only can but must make the necessary inquiry.

**B. The prosecution's contention that the inquiries regarding petitioner's alleged Lake County activities were unrelated to the subject-matter of his pending Marion County indictment not only ignores both the law and the facts but also omits to mention that petitioner's counsel before the Committee repeatedly but vainly called attention to the connection between the two.**

Before the Committee, Mr. Travis, who appeared both for petitioner (R. 90) and for his co-defendant Blaier (R. 76-77), repeatedly advised the Chairman that the questions being asked about the alleged Lake County activities bore upon and were related to the subject-matter of the pending Marion County indictment (R. 78, 81-82, 84, 86, 91-92, 96, 125, 128, 132-134). See also R. 93-94, where petitioner was temporarily represented by other counsel. But the Chairman, another member, and the Committee's Counsel all insisted that the two were unrelated (R. 81-82, 84-85, 86, 128-129, 132-135).

If, as Committee Counsel first asserted (R. 21-23), as the Chairman later declared (R. 153), and as the Committee ultimately found in its Second Interim Report (p. 592, quoted at Pet. Br. 26), petitioner "fixed" the Lake County indictment in 1957, then, under Indiana law, see cases cited at Pet. Br. 37-38, evidence to that effect would have been admissible at the trial of the Marion County indictment (R. 182-189) alleging conspiracy and bribery in 1956.

The prosecution grudgingly concedes as much, saying (U.S. Br. 40-41),

"It may well be—we do not dispute the point—that if petitioner, in response to the committee's question, had admitted using funds of the Carpenters Union to bribe the Lake County prosecutor to halt the investigation, his admission would have been admissible at the Marion County trial as evidence of consciousness of guilt (i.e., of the 'land deal' charges which the Lake County grand jury had under investigation)."

And yet the prosecution also says (U.S. Br. 40): "That [Lake County] grand jury investigation, it is true, involved an inquiry into charges relating to the highway matter which became the subject of the Marion County indictment, but otherwise *the committee's inquiry was totally unrelated to the latter affair.*" We have added the italics, out of sheer amazement. Because, plainly, once it is conceded, as it must be and as it has been, that evidence of the Lake County transactions is admissible at the trial of the Marion County indictment, the relationship between the two is irrevocably established.

Moreover, at no point in the prosecution's argument, with the possible exception of footnote 14 at U.S. Br. 40, is there any reference to the long and ultimately unsuccessful effort of counsel for petitioner and Blaier to demonstrate to the Committee the connection between the two proceedings. The account at U.S. Br. 45-46 (Par. "1") falls far short of apprising the reader of what petitioner's counsel actually said.

C. The prosecution's contention, that petitioner is groundlessly asserting prejudice had he invoked the privilege against self-incrimination, rests on a complete misconception of *Slochower v. Board of Education*, 350 U.S. 551.

We argued (Pet. Br. 39-41) that, had petitioner invoked the privilege against self-incrimination, that fact would have circumscribed his freedom of action at the trial of his pending Indiana indictment, since under Indiana law an earlier claim of self-incrimination can be the subject of an adverse inference if the witness thereafter elects to take the stand; and we cited *Adamson v. California*, 332 U.S. 46, and *Twining v. New Jersey*, 211 U.S. 78, for the proposition that such an adverse inference at a trial in the Indiana courts would not violate the Fourteenth Amendment.

The prosecution does not, no doubt because it cannot, challenge our reading of the Indiana law (U.S. Br. 47-48);

see *Crickmore v. State*, 213 Ind. 586, 592-593, 12 N.E. 2d 266, 269:

"Appellant testified as a witness. On cross-examination he was asked if it was not a fact that in the trial of Peats he took the witness stand, but refused to answer a question upon the ground that it might incriminate him. There was an objection by appellant, which was overruled by the court. The witness answered: 'No, I don't think I said that.' The prosecuting attorney referred to the fact in argument. Appellant contends that the state is not permitted to sully or prejudice his defense or character by referring to his refusal to testify; and it is contended that the statement of the prosecuting attorney, commenting upon the fact that appellant had refused to testify in the other case, was misconduct and prejudicial. But there is no validity in this argument. If the defendant had not tendered himself as a witness, it would have been improper to comment upon his refusal to testify in this case, or in any other case, but, since he tendered himself as a witness, it was proper to cross-examine him as fully as any other witness. By becoming a witness, he waived his right not to be required to give evidence against himself."

Now, plainly, this does not go nearly as far as *Adamson* or *Twining*, because in those cases it was held proper to comment on the defendant's refusal to testify. But the prosecution argues that no such inference can properly be drawn because of *Slochower v. Board of Education*, 350 U.S. 551. "For," says the prosecution (U.S. Br. 48),

"the precise holding of *Slochower* was that it is fundamentally unfair, and hence violative of due process, for a state to draw or permit the drawing of just such an adverse inference as Indiana permitted to be drawn in the *Crickmore* case from the invocation before a federal tribunal or agency of one's constitutional privilege under the Fifth Amendment not to be a witness against oneself."

We do not thus read *Slochower*, and we doubt whether anyone else would. What that case held was that it was

violative of due process automatically to dismiss, without even an opportunity for explanation, a State teacher who had invoked the Federal privilege against self-incrimination, because to permit such action would be transforming the privilege into a plea of guilty, and hence be plainly unreasonable. The present point could not arise in *Slochower*, since the person who had earlier invoked the privilege there never had an opportunity to be a witness later on. Thus the *Slochower* case would be in point here only if it were law in Indiana that an invocation of the Federal privilege against self-incrimination, earlier made by one who later was tried as a defendant in a State criminal proceeding, necessarily amounted to a plea of guilty at the later trial.

Of course that is not the law of Indiana. Nor is it law in Indiana that the failure of the defendant to take the stand in his own behalf can be made the subject of comment, although the *Adamson* and *Twining* cases do permit such a course. All that Indiana says is that, if a defendant takes the stand, the fact that he has earlier claimed his privilege can be shown and used against him. Since, notwithstanding *Slochower*, this Court still regards *Adamson* and *Twining* as law, see *Cohen v. Hurley*, 366 U.S. 117 at 128-129, we are unable to find any infirmity in Indiana's *Crickmore* rule, which is so much more tender to defendants than California's *Adamson* doctrine or New Jersey's *Twining* principle.

Nor is there more merit in the prosecution's suggestion (U.S. Br. 50-51) that the unfairness in this situation arises not from the dilemma into which the Committee placed petitioner, but from the *Crickmore* rule; that any resultant unfairness is attributable, not to the Committee, but to the Indiana courts; that petitioner's proper course is to seek review here of the Indiana ruling; and that (U.S. Br. 51) "The federal government cannot be required to stay its hand because in a subsequent State proceeding the State

might conceivably fail to meet its constitutional obligations."

There are, of course, several answers to this exercise in non-causal causation: But it seems sufficient to remark at this juncture that, as the Fourteenth Amendment now stands, it is not violated by the application of Indiana's *Crickmore* rule.

**III. THE PROSECUTION'S ARGUMENT THAT THE COMMITTEE WOULD HAVE PERMITTED HIM TO INVOKE HIS FEDERAL PRIVILEGE AGAINST SELF-INCRIMINATION IN RESPECT OF HIS IMPENDING STATE TRIAL RESTS ON SPECULATION, AND DOUBTFUL SPECULATION AT THAT.**

The prosecution argues (U.S. Br. 52-53):

"There cannot be the slightest doubt, then, that the committee would have honored a claim of privilege by petitioner as to any aspect of this subject of inquiry [i.e., the Lake County matter], and that petitioner was well aware of that fact."

And again (U.S. Br. 53-54) there is mention of

"what [the committee] indicated it was prepared to do in [petitioner's] own case, i.e., honor a claim of privilege based on feared incrimination under state law."

It goes without saying that it is speculative in the extreme to talk about what the Committee might have done in petitioner's case if he had invoked a privilege that in fact he repeatedly disclaimed, simply because the Committee allowed other witnesses to assert the claim that petitioner himself refused to assert.

Moreover, the record plainly shows that this kind of speculation would have been unsafe, inasmuch as the Committee treated petitioner quite differently than it did his co-defendant Blaier.

1. The first witness, Raddock, invoked the privilege against self-incrimination with the formula, "On the advice of counsel I refuse to answer the question on the ground that it may [or, "to do so might"] tend to make me a witness against myself." (R. 18, 19, 20, 21, 24, 25, 28, 29, 30, 31, 32, 33).

2. The next witness, Sawochka, employed the expression "On the advice of counsel, I respectfully decline to answer the question and exercise my privilege under the fifth amendment of the United States Constitution not to be a witness against myself" (R. 48, 49, 50, 51, 52).

3. Johnson, called next, said "On the advice of my counsel, sir, I decline to answer the question upon the ground my answer might tend to incriminate me" (R. 55).

4. Sullivan, as we have pointed out (Pet. Br. 13-14), invoked the attorney-client privilege (R. 56-76).

5. Next came Blaier, a co-defendant with petitioner in the pending Marion County indictment; his ground for refusal to answer (R. 82, 83-84, 86) was "that it relates solely to a personal matter not pertinent to any activity which this committee is authorized to investigate, and also because it might aid the prosecution in the case in which I am under indictment."

In view of the obvious difference between Blaier's grounds and those asserted by Raddock, Sawochka, and Johnson, we are unable to understand how (U.S. Br. 13, note 6) the Committee—or anyone else, for that matter—could possibly have "thought Blaier intended by this statement to invoke the privilege against self-incrimination." At any rate, he was not ordered to answer, and was never cited for contempt.

If, then, the prosecution is right in contending (U.S. Br. 52-54) that the Committee would have treated petitioner as it treated the other witnesses, then, we submit, he had

every right to assume that his own later refusal (R. 121-122, 123, 124-125)—

"on the ground that it relates solely to a personal matter, not pertinent to any activity which this committee is authorized to investigate, and also it relates or might be claimed to relate to or aid the prosecution in the case in which I am under indictment, and thus be in denial of due process of law—

would be treated precisely as Blaier's was. In fact, however, his refusal was treated very differently.

Whether it was petitioner's addition, to Blaier's formula, of the words "and thus be in denial of due process of law," that prompted the Committee to order petitioner to answer when it had not given similar directions to Blaier; whether it was the fact that petitioner was General President of the union while Blaier was only its Second General Vice-President that underlay the difference in the Committee's actions in the two cases, the record does not show. But it is precisely this difference in treatment that underscores the unsoundness of the prosecution's strongly pressed speculative argument as to what the Committee might have done if petitioner had followed a course different from the one he actually took.

**IV. IT IS A VIOLATION OF DUE PROCESS OF LAW FOR A LEGISLATIVE COMMITTEE TO PRETRY A CRIMINAL CASE AS THE COMMITTEE DID HERE BY REQUIRING A WITNESS THEN UNDER INDICTMENT TO TESTIFY REGARDING MATTERS ADMISSIBLE AGAINST HIM AT THE TRIAL OF THAT INDICTMENT.**

The prosecution says (U.S. Br. 40), referring to our argument at Pet. Br. 41-47, that "It distorts the record to say that the committee attempted to 'pretry a pending criminal case.' "

Any distortion arises from the prosecution's stubborn insistence (U.S. Br. 40) that the Committee's inquiry into

the alleged Lake County transactions was "totally unrelated" to the pending Marion County indictment that had been returned against petitioner before he was called as a witness. Inasmuch as the prosecution now admits (U.S. Br. 40-41) what we have always urged (Pet. Br. 35-39) and what indeed petitioner's counsel vainly tried to tell the Committee, namely, that evidence concerning the Lake County transactions would be admissible at the trial of the Marion County indictment (*supra*, p. 10), it is plain that the two sets of transactions were in fact very closely related, and that accordingly the Committee was pretrying a criminal case. If there is any distortion here, it is not of petitioner's making.

We argued also (Pet. Br. 46-47) that the prosecution was demonstrably wrong (Br. Op. 8, 9) in putting forward *Sinclair v. United States*, 279 U.S. 263, for the proposition that "a congressional committee can investigate matters which relate to pending criminal cases," inasmuch as the *Sinclair* case involved only a pending civil action.

Now the prosecution admits its error (U.S. Br. 42-43), saying that "While the pending suit in that case was a civil action, as petitioner observes (Br. 46, 47), it is evident that the action had unmistakable criminal overtones; application had already been made for a special grand jury."

We must confess our inability to understand how the collateral impanelling of a grand jury can change the quality of a pending civil action, or to recognize any such *tertium quid* as a civil action with unmistakable criminal overtones. Is that expression designed to describe a civil action in which, if judgment goes for the plaintiff, the defendant must not only pay damages but go to jail as well? If that is what the prosecution means, we can only say that we have been unable to find any such hybrid in the books.

This is not a matter of labels, but of substance, and the prosecution's assertion (U.S. Br. 43) that "the rationale of the [*Sinclair*] decision applies to a situation in which the pending action is a criminal prosecution" breaks down on just that substance:

The defendant in a civil action can be compelled to testify as an adverse witness, at the trial (Rule 43(b), F.R. Civ. P.), or in advance of trial, on depositions (Rule 26(a)) or interrogatories (Rule 33). No unfairness, accordingly, results when his testimony is first elicited at a Congressional hearing, subject of course to the qualification (*Sinclair*, 279 U.S. at 295) that "Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; \* \* \*."

The defendant in a criminal prosecution, however, can not be compelled to testify.

It is because of that basic and fundamental distinction that the rationale of the *Sinclair* case, which involved a pending civil suit, is demonstrably inapplicable to a pending criminal prosecution.

The prosecution urges (U.S. Br. 43-44) that "The Supremacy Clause \* \* \* is inconsistent with the notion that a committee of Congress \* \* \* can be frustrated in its investigation by the fact that the information it seeks may happen also to be relevant to charges made in a pending state indictment."

We shall deal with the Supremacy Clause below. At this juncture we content ourselves with pointing out that Congress, to avoid just this frustration, declared for 97 years, from 1857 to 1954, that no testimony given before one of its committees "shall be used as evidence in any criminal prosecution in any court" against the person giving it. Sec. 2 of the Act of Jan. 24, 1857, c. 19, 11 Stat. 155, 156; Act of Jan. 24, 1862, c. 11, 12 Stat. 333; R.S. § 859; 28 U.S.C. (1926 to 1946 eds.) § 634; 18 U.S.C. (1952 ed.)

§ 3486; *Adams v. Maryland*, 347 U.S. 179; Sec. 1 of the Act of Aug. 20, 1954, c. 769, 68 Stat. 745.

The way to enlarge the areas into which Congressional committees may properly inquire is to restore 18 U.S.C. (1958 ed.) § 3486 to its pre-1954 version, not to consign to a Federal prison a witness who resisted a Congressional committee's efforts to strengthen the possibility that he would be lodged in a State prison.

**V. THE PROSECUTION'S CONTENTIONS HERE TRIVIALIZE A BASIC CONSTITUTIONAL RIGHT INTO A MERE FORM OF WORDS.**

The prosecution here does not rest its position on any basic principle of Federalism, real or supposed. It does not argue that the rule of *United States v. Murdock*, 284 U.S. 141, permitted the Committee to interrogate petitioner at will concerning the precise subject-matter of his pending Indiana indictment, as well as about any other matters that would have been admissible against him and harmful to him at the trial of that indictment. It does not discuss, let alone cite, the earlier contrary holding by Chief Justice Marshall in *United States v. Saline Bank*, 1 Pet. 100, which petitioner has been at such pains to disentangle from subsequent misconceptions of its scope (Pet. Br. 56-60, 86-90). Rather, the prosecution asserts that, since it is to be supposed that the Committee would have permitted petitioner to refuse to answer had he claimed a privilege against self-incrimination in the form in which Raddock, Sawochka, and Johnson were permitted to claim it (*supra*, page 15), and since petitioner expressly disclaimed reliance on any privilege against self-incrimination (R. 125, 127, 130, 135, 146), then, since he rested his refusal only on a "denial of due process of law" (R. 122, 123, 125) on the ground that the question "reaches into the area of a question under which I am indicted" (R. 128), he is in contempt of Congress.

We submit that this approach trivializes into a form of words a basic constitutional guaranty of individual liberty, and moreover involves just precisely the "ritualistic formula or talismanic phrase" that was held in *Emspak v. United States*, 349 U.S. 190, 194, to be wholly unnecessary.

We suggest that petitioner's rights must be based, not on the legal tags he attached to his reasons for refusal, but on the factual grounds he gave, namely, that each of the unanswered questions "relates or might be claimed to relate to or aid the prosecution of the case in which I am under indictment" (R. 122, 123, 125), that the question "reaches into the area of a question under which I am indicted" (R. 128), that "it does reach into the matter under which I am indicted" (R. 128).

The prosecution argues that what petitioner sought (U.S. Br. 54) "was to be granted the protection of the privilege against self-incrimination without invoking it," that (U.S. Br. 56)—

"what petitioner's argument comes to is that a witness before a congressional committee who would avail himself of the protection of the privilege against self-incrimination may do so in either of two ways. He may claim the privilege forthrightly and in unambiguous terms. Or he may, while disclaiming the privilege, seek its benefits under another name and in a different guise."

This amounts to saying that petitioner, already under a State indictment, was bound and limited by the specific invocation of the privilege against self-incrimination, even though by doing so he exposed himself to three separate and distinct penalties:

First, since any claim of the privilege against self-incrimination could constitutionally have resulted in an adverse inference had he elected to testify at the trial of the pending indictment, *Crickmore v. State*, 213 Ind. 586, 12

N.E. 2d 266, and discussion *supra*, pp. 11-14, the making of such a claim would, at the very least, have limited his freedom of action at that trial.

Second, to have made such a claim of privilege would have raised a problem concerning his future employment in view of the AFL-CIO ethical code (R. 146-147), regardless of the precise terms of that code, which are not in this record.

Third, to have made such a claim of privilege would, in the expressed views of the Committee Chairman (R. 19-20, 23-24, 24-25, 31-32, 38-39, quoted at Pet. Br. 10-13; and R. 32-33, quoted at Pet. Br. 82-83) as well as in the Committee's Second Interim Report (Sen. Rep. No. 621, Part 2, 86th Cong., 1st sess. [Govt. Ex. 6, R. 161-162, 170], at pp. 554-556, 592), have been tantamount to a confession of guilt.

The prosecution argues (U.S. Br. 57) that "The Constitution does not give a privilege against self-incrimination, for the use of those who are willing to claim it candidly, and, in addition, a parallel privilege for the use of those whose only legitimate ground for refusing to answer relevant and proper questions is the fear of self-incrimination but who for personal reasons are unwilling to claim the appropriate privilege."

Passing the obvious question-begging as to the propriety of the questions asked, the foregoing assertion explains very clearly why we say that, on the prosecution's view, this case involves the power of a Congressional committee to force a witness under indictment to claim a privilege against self-incrimination, regardless of the penalties that such a claim may involve. That is why we go on to show that to force such a choice—such a dilemma, actually—on an already indicted witness involves a denial of due process of law, which this petitioner has standing to invoke.

**VI PETITIONER HAS STANDING TO INVOKE UNDER THE DUE PROCESS CLAUSE THE CONCEPT OF FEDERALISM FORMULATED BY CHIEF JUSTICE MARSHALL.**

The prosecution admits (U.S. Br. 54-55, note 22) that petitioner "had a right to rely, in his appearance before the committee, on any privilege available to him under the law and that he was not limited to pleading his privilege against self-incrimination." But, notwithstanding this footnoted concession, the prosecution argues at length, through two major points and more than six pages of text (U.S. Br. 52-58, Points IV and V), that he had no standing either to rely on his asserted "denial of due process of law" (R. 122, 123, 125) or to challenge the rule of *United States v. Murdock*, 284 U.S. 141, this because he expressly disclaimed specific reliance on the privilege against self-incrimination. Thus the prosecution effectively withdraws its concession, and supports the contrary ruling of the district judge (R. 174) that

"the relief that this defendant ought to have gotten before the Committee of Congress was his claim under the immunity clause of the Fifth Amendment. He did not seek it and it is the only way he could properly seek it, before a Committee of Congress."

We think it too plain for argument that disclaimer of reliance on one clause of the Constitution does not amount to disclaimer of reliance on any other clause. Petitioner never disclaimed reliance on what he asserted to be "in denial of due process of law" (R. 122, 123, 125), he declared himself not qualified to say whether the due process clause included the privilege against self-incrimination (R. 130, 131), and his counsel was not asked to clarify that

\* We note in passing that the prosecution argued below (U.S. Br. in C.A., pp. 26-27, Point IV) that "There was no error on the part of the Court in holding that the plea of self-incrimination was the only way appellant could properly seek relief from interrogation by the committee."

matter. And, specifically, petitioner never disclaimed the basic contention he presented to the Committee, namely, that to interrogate him in respect of anything that "relates or might be claimed to relate to or aid the prosecution in the case in which I am under indictment" would indeed "be in denial of due process of law" (R. 122, 123, 125).

That being so, he had standing to assert that for a Committee of Congress to require an indicted witness to invoke the privilege against self-incrimination where such invocation, as here, necessarily involves penalties and thus does not completely protect the witness, is in itself a violation of due process of law because essentially unfair.

Surely, then, he can argue without limitation or restriction the proposition he advances here, that what the Committee forced him to do *was* "in denial of due process of law," and that accordingly his conviction for contempt of Congress cannot be sustained. Cf. *Deutch v. United States*, 367 U.S. 456, 471.

Thus there is no occasion to consider whether, as the prosecution argues (U.S. Br. 57), "The privilege against self-incrimination is a specific guaranty of civil liberty, free of the need for applying such general tests as characterize decision under the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment (e.g., 'ordered liberty')," or whether (*id.*) "To create a vaguely parallel privilege, of undefined scope, which a witness could claim by invoking 'due process' or similar general concepts, would confuse and dilute the specific guaranty."

Similarly, whether the First Amendment may do service for the Fifth (*Sacher v. United States*, 252 F. 2d 828, 837 (D.C. Cir.), reversed, 356 U.S. 576; see U.S. Br. 56) is not a matter in issue here. And whether the due process clause of the Fifth simply parallels the self-incrimination clause (U.S. Br. 56) is likewise not in issue, because here

there is involved the effort to make an indicted witness invoke the self-incrimination clause when such invocation involves penalties. To urge, as the prosecution does throughout, that petitioner was indeed so limited, to argue, as the prosecution does (U.S. Br. 56), that any other view is "a perverse use of the Constitution," seems to us an instance of "the littleness and the looseness of men's interpretation of the Constitution" against which James Bradley Thayer long ago warned. Thayer, *Legal Essays* (1908) 159.

We urge, instead, a return to the concepts in this field formulated by the Great Chief Justice, namely, "that a party is not bound to make any discovery which would expose him to penalties," *United States v. Saline Bank*, 1 Pet. 100, 104, even when the penalties are State penalties and the discovery is sought by a Federal tribunal. Here petitioner's explicit ground for refusal to answer was that each question (R. 122, 123, 125) "relates or might be claimed to relate to or aid the prosecution in the case in which I am under indictment."

It is well to repeat that the prosecution never once faces up to the *Saline Bank* case. Indeed, its studied refusal even to cite that decision seems to us the greatest compliment that could be paid our reading of that case's actual holding (Pet. Br. 56-60, 86-90). And certainly, when, as here, the questions to be decided concern both the Supremacy Clause (U.S. Br. 43) and the true principles of Federalism (Pet. Br. 34, 60-65), it would be well to turn for enlightenment to Chief Justice Marshall, whose notions of national power were conceived in the bloodied snows of Valley Forge (1 Beveridge, *The Life of John Marshall*, c. IV, pp. 108 *et seq.*) and first proclaimed in the Virginia Ratifying Convention (1 *id.*, cc. X-XII, pp. 357 *et seq.*), rather than to rely on those who bandy about asserted standards of constitutional interpretation unsupported by citation of authority (U.S. Br. 43-44, 56-58).

The prosecution points- (U.S. Br. 45) to the unanimity in *United States v. Murdock*, 284 U.S. 141, which we have urged be reconsidered (Pet. Br. 49-66). We submit that there is far more basis to reconsider *Murdock* than there was for the United States, in the recent case of *Lurk v. United States*, 366 U.S. 712, to seek the overruling of the similarly unanimous decisions in *Ex parte Bakelite Corp.*, 279 U.S. 438, and *Williams v. United States*, 289 U.S. 553. See U.S. Br., No. 669, Oct. T. 1960, at pp. 97-125.\*

For in here asking reconsideration of *Murdock*, which rested on *Hale v. Henkel*, 201 U. S. 43, and on what was supposed to be English law, we showed that the English law was quite the other way, and that *Hale v. Henkel* had misconceived the true holding of *United States v. Saline Bank*, 1 Pet. 100. See Pet. Br. 49-65. We did not seek to reargue *Murdock* as an original proposition, as the United States in *Lurk* sought to reargue *Bakelite* and *Williams*.

Even in England, where *stare decisis* has become such an absolute that common law there now seems all but calcified, the courts are prepared to brush aside a decision made *per incuriam*, which is to say, where governing precedents have been overlooked through carelessness or neglect. See Sir Carleton Kemp Allen, *Law in the Making* (6th ed. 1958) 235-237, 240-243, 340-341.

That is why we have no hesitation in arguing for a return to the *Saline Bank* doctrine, and for a declaration that where, as here, an indicted witness before a Congressional committee will be subjected to penalties if he invokes the privilege against self-incrimination in order to avoid being interrogated on matters admissible against him and harmful to him at the trial of that indictment, where the information sought to be elicited "relates to or

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\*The latter issues are once more before the Court, in view of the granting of certiorari on November 9, 1961, in *Lurk v. United States*, No. 341, Misc. (now No. 481), and in *Glidden Co. v. Zdanok*, No. 242.

might be claimed to relate to or aid the prosecution in the case in which I am under indictment," such interrogation is indeed "in denial of due process of law" (R. 122, 123, 125).

### CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that the judgment below should be reversed, with directions to dismiss the indictment.

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